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A Legacy in Land: A Primer on Realty and Reality

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A Legacy in Land

a Primer on Realty & Reality

Text and photographs by Mateusz Perkowski

The struggle over land historically has caused feuds between neighbors, peasant revolts against lords, and wars among empires. Our own corner of the world, however, often has been thought of as an exception. In the early days of the Oregon Territory, you did not need to be an aristocrat to own land; in fact, land ownership didn't require any fortunes or status whatsoever. As long as you were willing to yolk some oxen to a covered wagon, and had enough bacon and biscuits for the journey, you were just as entitled to a free 160-acre parcel of exceptional farmland as anybody else, provided you were tough enough to make it to the Willamette Valley alive. In many ways, the Oregon Donation Land Claim Act of 1850 was the most egalitarian land law ever recorded. But fairness, as is often the case, was merely an illusion.

The claimants who raced to Oregon in the 1850s were given a lot less flexibility than those who had settled on the land before Oregon was made a territory in 1848. Not only were pre-1850 settlers allowed twice as much land, but they were also able to draw up claims according to geographical features rather than abiding by geometric surveying methods. By

1855, the Oregon Land Claim Act reached its sunset, and new arrivals had to pay for land that was exponentially growing in price. In other words, whoever owned their land the longest stood to gain the most benefit.

The most bizarre controversy surrounding the Oregon Donation Land Claim Act – to modern eyes, anyway – was that it was said to retard the normal growth of urban areas. The massive farmland giveaway resulted in an extremely diffuse pattern of human dwellings, which many people complained discouraged the development of cities and prohibited the growth of non-agricultural economy. Rural sprawl, apparently, was perceived as a danger to the vitality of urban areas.

The irony, of course, is that over a hundred years later the rural lands were considered threatened by uncontrolled urbanization. In his 1973 opening address to the legislative assembly, Governor Tom McCall cited “sagebrush subdivisions, coastal ‘condomania,’ and the ravenous rampage of suburbia in the Willamette Valley” as a menace to Oregon’s economy and landscape. “The interests of Oregon for today and in the future must be protected from grasping wastrels of



Cadastral map in the Champoeg area, circa 1860.

the land,” he said. “We must respect another truism: that unlimited and unregulated growth leads inexorably to a lowered quality of life.” Later that year, the legislature adopted Senate Bill 100, which called for a state-wide system to preserve farms and forest land in Oregon. For some, it marked the conception of an iconic land use system that has protected our state’s environment for future generations. For others, it was the beginning of a government bureaucracy whose creeping restrictions continue to threaten American ideals of freedom and private property.

Surprisingly, both sides of the land use battle have little disagreement over what goals the land use system strives to achieve. The conflict lies not in the facts but in what they mean for Oregonians: where one side sees agricultural conservation and controlled growth, the other sees urban containment and social engineering. Where one side sees the betterment of the community, the other sees the persecution of the individual. What the majority of Oregonians believe to be the truth remains elusive. In the years following Senate Bill 100, which established the Land Conservation and Development Commission (LCDC) and the Department of Land Conservation and Development (DLCD), several initiatives attempted to repeal or alter the land use planning system that was developed by these agencies. Each attempt – in 1976, 1978, and in 1982 – was soundly defeated. It would appear that Oregonians approved of land use planning. However, recent initiatives aimed at altering the land use system have proved popular in elections: Measure 7 passed by an 8% percent margin

in the 2000 elections (before being struck down as unconstitutional) and Measure 37 passed with more than a 20% margin in 2004. Both basically called for waivers of land use regulations adopted after an individual bought land, unless the government was willing to compensate for value that was lost as a result of the regulation.

Have Oregonians grown disillusioned with the land use system? Was the approval of these measures a sign of rebellion? Were the voters duped? Or do they simply think property rights and preservation are not contradictory ideals? As could be expected, the answers to these questions differ depending on whom you talk to. Measure 37, the most recent effort to modify Oregon’s land use system, is considered a major development by both sides of the

ongoing land use battle. Opponents of Measure 37 tend to view the initiative’s passage as the result of a deft marketing gimmick. By outwardly appearing to fight for the property rights of small farmers, Measure 37 is thought to have clandestinely distracted the public from its true beneficiaries: large land owners and developers. Proponents, meanwhile, scoff at the suggestion Oregonians were tricked. They say opponents of Measure 37 had plenty of time and money to present their argument, and failed; claiming that vot-

"The interests of Oregon for today and in the future must be protected from grasping wastrels of the land . . . We must respect another truism: that unlimited and unregulated growth leads inexorably to a lowered quality of life."

— Governor Tom McCall, 1973

ers didn’t know what they were getting into is either the result of disingenuous spin, isolation from reality, or a little bit of both. One thing is clear: even months after the election, Measure 37 remains as divisive as ever.

1000 Friends of Oregon, an organization co-founded by Tom McCall to monitor the implementation of Senate Bill 100, strongly opposed Measure 37 and its predecessor on the grounds that the underlying goal was to subvert land use protections. Dan Eisenbeis,



Harry Yost

Harry Yost, a farmer who owns land in Clackamas County, says he doesn't expect to get a dime from the government—he and his wife Jeanne just want the right to use their land the way they intended to when they bought it in 1966.

a staff planner for the organization, says Measure 37 “creates a privileged class of landowners who have special rights to be exempt from the land use rules by which the rest of us abide.” The organization contends that because property owners who’ve owned land longer than others – before regulations were imposed – are held to a different standard, the initiative creates an advantage that is prohibited by Oregon’s constitution. 1000 Friends of Oregon, Eisenbeis explains, supports the idea of compensation as a way to strengthen the land use system; however, the way Measure 37 plays out in reality precludes anything but waivers. Oregon has faced an extremely tight budget for years, so by omitting mention of a compensation system, the initiative de facto forces governments to waive regulations.

Some of those who have actually filed Measure 37 claims are inclined to agree. Harry Yost, a farmer who owns land in Clackamas County, says he doesn’t expect to get a dime from the government – he and his wife Jeanne just want the

right to use their land the way they intended to when they bought it in 1966. “We were thinking when we bought this place that when I retired, if we got hard up, we could sell off a few acres and we wouldn’t have to go on relief or welfare,” he says. “So, then they come along and they pass these laws, and it all wound up that we couldn’t do anything with it.”

Yost isn’t sure what he wants to do with the land yet. Perhaps he just wants to build dwellings for his two adult daughters, provided they want to return to the family farm someday. But he also isn’t ruling out the idea of separating a portion of his 32 acres into ten parcels that other people could live upon. “I don’t know what I want to do with it, but I want the freedom I had when I bought it,” he says. The allegation that Measure 37 creates an unfairly privileged class of landowners is laughable to Yost, who says that such a system has existed for years. In 1994, LCDC imposed a farm income test requiring property owners in exclusive farm use zones to gross \$80,000 a year or more in order to build on their land, which Yost says benefits only large land owners. “I don’t know how anybody could do it on 32 acres,” he says.

Part of the frustration Yost and others feel is due to a sense that land use laws artificially try to regulate how they live their lives. Yost, who is in his 80s, spent his life juggling farm work and a career as a longshoreman. “I’d work ‘til one o’clock in the morning mowing hay, then jump and take a bath, hit the sack for an hour or two, and be back to work by



"Because some Chardonnay-sipping, Saab-driving, Pearl District-living wants to drive out to the Gorge and doesn't want his or her visual s offended . . . they expect the land owner to bear that cost."

—Ross Day, Director of Legal Affairs for Oregonians in Action

six the next morning,” he says. Under current regulations, Yost would have to devote all his work time to meet the farm income test just to build a home on his property. To him and other farmers, the land use planning system seeks to regulate more than just how they use their land – it dictates what they do for work and where they choose to live. Considering that 67% of Oregon’s farms are less than 99 acres, and 81% of all Oregon farms make less than \$50,000 in sales each year, Yost likely isn’t alone in this sentiment.

People involved in land use planning, while empathizing with Yost and others like him, say that the individual property owners’ intentions often aren’t realistic in application. New housing developments require a great deal more than a few acres of land – in modern times, each home is connected to a larger network of infrastructure that taxpayers field the bill for. Susan McClain of Portland’s Metro Council government says not many people who hope to develop their land “have the resources to build their own roads or their own water facilities. So, they’re really depending on the planners or the jurisdiction to determine the least costly way to provide infrastructure to these new urban areas.” Because roads, sewers, electricity, schools, police, and fire protection are all public investments that make a community work, it is impossible to divorce an individual development from the world around it.

Such arguments don’t get much credit from organizations that have called for drastic reform of the land use system, such as Oregonians in Action (OIA), a lobbyist group responsible for both Measure 37 and Measure 7 four years earlier. They believe that the increases in property taxes to regional governments would make up for the expenses required by infrastructure. More importantly, market forces them-

selves would prevent new housing developments from arising in inappropriate places. “Just because I’m allowed to do something – just because I can go out and build – doesn’t mean it’s going to happen. There are physical and economic realities of life,” says Ross Day, the Director of Legal Affairs for OIA. The very basis of the land use system isn’t the implementation of reasonable growth patterns, he says, but maintaining the aesthetic preferences of an urban elite. As Day says, “Because some Chardonnay-sipping, Saab-driving, Pearl District-living Portlander wants to drive out to the Gorge and doesn’t want his or her visual sensibilities offended – because they don’t want to see somebody’s house on a hill so that they can see this beautiful landscape – they expect the land owner to bear that cost.”

In the eyes of many farmers, however, the land use system is based on more than just the arbitrary preferences of urbanites; in their view, it prevents unnecessary conflicts between farmers and suburban residents. David Cruickshank, wearing dusty overalls and nimbly operating his Bobcat loader as two dogs try to bite the machine’s tires, seems like neither a Chardonnay-sipper nor a Saab-driver. As a farmer and president of the Yamhill County Farm Bureau, Cruickshank “had a fear of Measure 37 allowing non-farm residential people to move out in the agricultural area.” (Both he and the bureau officially opposed the initiative, although Cruickshank says the decision caused tension within the bureau’s



David Cruickshank, farmer and president of the Yamhill County Farm Bureau.

"A large portion of agriculture in the valley is raising certified seed," says Cruickshank . . . "We have no tolerance for weed seeds in the crop. Zero."



ing Portlander
sensibilities

constituency). The fear didn't derive from some kind of xenophobic country mentality, but from the experience that urban and rural uses of land are usually incompatible. Commuters on their way to work have a hard time with slow-moving farm equipment, much as farmers have a hard time with SUVs blowing by their tractors at 80 miles per hour. "Farmers have enough trouble now moving equipment up and down the road safely," says Cruickshank. "As equipment gets bigger and roads get more crowded, it gets more difficult all the time."

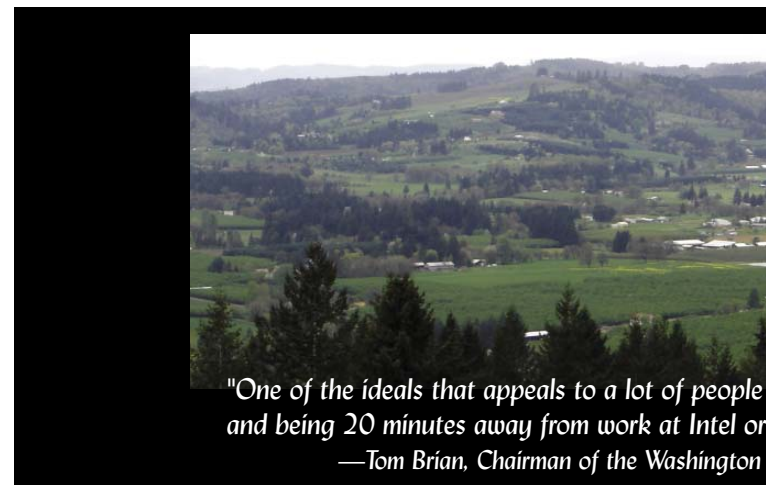
Cruickshank worries about the effect suburbs will have on the water supply, as well as how suburban lawns will affect some farmers' crops. "A large portion of agriculture in the valley is raising certified seed," says Cruickshank. Even a few weeds allowed to grow on suburban lawns can seriously affect grass farmers. "We have no tolerance for weed seeds in the crop. Zero," he says. "You get one weed seed, and it costs you big bucks."

While the dissonance between rural and urban land uses has quickly become an issue in Yamhill County, its neighbor to the north has been dealing with the problem for years. Washington County's farming and residential interests have particularly come into conflict because the county has some of the richest soil in Oregon, but it is also the home of Nike, Intel, and other non-resource based employers whose workforce requires a sizable amount of living space. The county's natural landscape and proximity to urban areas have amplified the need for both housing and farmland. "One of the ideals that appeals to a lot of people is living in a nice pastoral farm-like setting, and being 20 minutes away from work at Intel or downtown Portland," says Tom Brian, Chairman of the Washington County Board of Commissioners.

Those who move to the "nice, pastoral farm-like setting" are often in for a surprise. Not only are there complaints from suburbanites about slow-moving farm equipment, noise, and smells, but farmers' crops have been affected by the excess of dust from moving vehicles settling on their crops, which often prevents proper pollination. Despite the problems likely caused by new developments, Brian says it's his duty to heed Oregonians wishes in regard to Measure 37. "When something passes with 61% virtually across the state, then I think it's our job as elected officials to implement it as fairly and efficiently as possible."

Encroaching urbanization is among the reasons Washington County has one of the largest numbers of Measure 37 claims in the state. As property values for build-able land skyrocket, even farmers who

would prefer to keep their land for agricultural purposes begin to consider their options. "Their land value goes from \$10 or \$15 thousand an acre to \$400 thousand an acre. Their hundred acres is now worth \$40 million," says Brian. "It's been your family farm for a hundred years and you don't want to sell it. Then again, you think, 'Hmm. Gee, forty million dollars – what would that do for my family? I could go buy a farm somewhere else and have \$25-30 million left over.'"



Brian sees certain problems with Measure 37 but understands why land use regulations are often met with resentment. "They tend to layer and layer and layer," he says. "Government has been perceived as being more restrictive as there's been a substantial push to protect natural resource lands without compensation to the owners." On the other hand, Brian says compensation puts the government in a precarious position. "Do we get credit for the first amount of money we gave? How many times can someone come in and keep ratcheting up the use?" he asks. "There's nothing in Measure 37 that says you only get one bite at the apple."

In reality, however, Brian says it's unlikely the initiative will be used to extort local governments, simply because they don't have any money to spare. "Washington County will be compensating instead of waiving only in the rarest instance. We don't have the money to make any other decision. To that extent, we're a bit defenseless," he says. "No jurisdiction I'm aware of has enough money to prevent paving over the state."

It isn't only government administrators who are concerned about the ambiguities in the way Measure 37 was drafted. Surprisingly, even people who have filed claims under Measure 37 have serious misgiv-

ings about the law. In the opinion of Craig Chisholm, a claimant from Clackamas County, the process of trying to interpret and legally implement the initiative is akin to “a Delphic oracle where you get a peasant girl drunk and try to make sense of what’s she’s babbling.” As the trustee of a trust, Chisholm explains that it’s his fiduciary duty to maximize the value of land he is responsible for, which is why he filed a claim under Measure 37. But by leaving so many central questions unresolved – such as trans-



ferability of waivers – the initiative has created a great deal of uncertainty. “It’s not a legal document, it’s a political statement,” he says. “It’s disappointing to see such poorly drafted legislation.”

Chisholm doesn’t have a problem with the political statement of Measure 37, as he acknowledges there has been a growing dissatisfaction with the land use system in Oregon. Asking citizens to decide on such complex matters during fifteen seconds in a voting booth, however, is like “asking a high school kid to perform brain surgery.” It wasn’t that voters were duped, he says, but that it was impossible for anyone to determine the repercussions Measure 37 was likely to have without an open public discussion. In Chisholm’s mind, the problem is that television ads and lawn signs have replaced civic debate.

Chisholm isn’t the only one who feels that his hand has been forced by Measure 37. Elaine Newland, another claimant from Clackamas County, voted against the initiative because she believed the picturesque landscape of the Pete’s Mountain area where she lives would be destroyed if large land owners in the region were allowed to develop. Her worries, Newland says, were not unfounded, since many of her neighbors have filed for claims. Afraid of living on a single parcel of farmland surrounded by subdi-

visions, Newland filed a claim of her own – this way, if worse comes to worse, she can develop her land and move elsewhere. “We have to do what we can to save ourselves and get out of here,” she says.

When told of her predicament, John Charles of the Cascade Policy Institute, a libertarian think tank in Portland, said Newland’s position was “empowering.” Although some claimants may feel pressure to develop their land, Charles says it is better for such issues to play out in the free market rather than relying on government to artificially control them. In the past, explains Charles, land owners have often found themselves boxed in by encroaching suburbs that destroyed the natural beauty surrounding their property. Because the Urban Growth Boundary crept right up to their doorsteps and no further, they had to put up with unsightly suburbs but received no added value to their own land. Newland, at least, has some options. “If the neighborhood develops in a way that she doesn’t like, then she has the financial compensation to pick up and move to find some other place,” he says.

Charles, in many respects, is an unlikely supporter of Measure 37, which he calls “a modest first step toward restoring property rights.” Before coming to the Cascade Policy Institute, he served as the Executive Director of the Oregon Environmental Council from 1980 to 1996. He grew disillusioned with Oregon’s system of land use planning because, in his eyes, it relied too heavily on the preferences of the planners themselves and too little on actual empirical data. “People were supposed to live in a certain way, and if you didn’t agree with that vision, they were utterly contemptuous of you,” he says. “You were a cultural barbarian.” To Charles, the idea that the government can decide how tax-paying property owners use their land contradicts the constitutional freedoms the United States is based upon. “If you always fear that what you’ve earned will be taken away from you, then liberty is a meaningless concept,” he says.

The question of how much authority the government has in regulating the lives of ordinary people is central to the dispute over land use in Oregon. Paradoxically, Measure 37 itself sets up guidelines for inappropriate uses – the initiative doesn’t apply to activities recognized as nuisances under the law, such as selling pornography or performing nude dancing. If private property rights supersede the dictates of the greater community, opponents of the initiative wonder, then why are these provisions necessary? “Why shouldn’t I be able to put a porn shop right next to your house?” Sierra Club volunteer leader Scott Chapman asks sarcastically.



Chapman, who is also the Sierra Club's local transportation and land use issue coordinator, says that the goals of the larger community must have a say in the choices of individual land owners. "We have this American ethic of ownership, and that's in conflict with the betterment of the public in some areas," he says. The argument that regulations have driven down property values is misleading, he explains, since a great deal of land has shot up in cost precisely because of the land use system. "A lot of the speculative land value increases are coming from that drive-by beauty. Why is some land in Hood River now worth \$50 million? It's because the value has been preserved all these years."

However, much of the land in question isn't desired for its pristine natural beauty but for its proximity to urban areas. When land owners suspect their property will end up being subsumed by the Urban Growth Boundary anyway, they don't understand why they can't be the one who decide when the land gets developed. "The property owner is the farthest down in the chain, in terms of how land is used," says John Abrams, whose mother Maralynn is filing a Measure 37 claim for the family's land in Yamhill County. The 342-acre property is located literally across the street from the suburbs of McMinnville, and has been in the Abrams family since the 1930s. From the very beginning, it was thought of as an investment. "For anybody in agriculture, land is the ultimate asset for retirement," says Abrams.

Because of the sheer size of the potential development, the Abrams' Measure 37 claim has become one of the most hotly debated in Yamhill County, and has received press coverage in both state-wide and local newspapers. Critics have pointed to it as a prime example of the negative effects the initiative will have on Oregon's landscape. John Abrams, however, doesn't see what all the fuss is about. Although he admits the land might be developed for both residential and commercial uses, the Abrams plan to make changes

incrementally and work with city planners on the best way to move forward. The 342-acres, in other words, won't turn into a complex of strip malls and housing tracts overnight. Mainly, the Abrams' objective is just to have the ball back in their court. "If you had the tenacity to hold on to a piece of property, you should be able to use it as you could have when you bought it," John Abrams says.

What's troubling to many advocates of the land use system is that many property owners are turning away from the traditional uses of the land. They agree that families who bought land in the early 20th century could have built subdivisions — except that back in those days, such a thought would have been ridiculous. This is another point on which supporters and opponents of the land use system seem to agree: given the current economic and trade conditions, development of land is simply a great deal more profitable than farming. In modern times, land owners stand to gain more financially from fields filled with one-acre dwelling parcels than fields filled with fruits, vegetables, or wheat. According to the Oregon Department of Agriculture (ODA), the number of apple farms, for instance, dropped 15% between 1997 and 2002. In actual acreage, that's 33% fewer apples orchards. Although Oregon still exports about 80% of its gross farm commodities, ODA Director Katy Coba says "there's no question we've had challenges in competing with foreign markets. We've got to work hard to stay competitive."

Oregon's rivalry with faraway farmlands is open to interpretation by both sides of the land use battle. Opponents of the current land use system wonder why agricultural land is so important to retain if domestic farms are having a hard time competing internationally. "Is there a shortage of farm and forest land in Oregon, or anywhere in the country? No. Why do you think Congress spends billions every year subsidizing farming? Because they have a surplus," says John



Detail of a mural by Richard Haas at the Oregon Historical Society.

Measure 37 should be seen not as a victory or defeat. Rather, it is the latest swing of a pendulum that has managed to elude equilibrium since the first pioneers crossed into the Oregon Territory and filed their own claims over a century ago.

Charles of the Cascade Policy Institute. Supporters of the land use system, meanwhile, say the reliance on homebuilding is short-sighted since the robust building economy may wane over time. In the end, houses can always be built, but prime farmland is unrecoverable. Betting on the permanence of cheap imported commodities, says the Sierra Club's Scott Chapman, is also myopic. "It seems strange that if I go to the store I see apples from around the world cheaper than those from Washington and Oregon," he says. "Is this a permanent thing, or are these sources going to dry up on us, just like oil is drying up on us?"

The importance of Oregon's landscape and agriculture, the chafe between property rights and preservation, and the role of government in shaping communities have all impacted Oregonians' perspectives in the land use battle. The electoral victory of Measure 37 doesn't necessarily place the bulk of Oregon's citizens on one side or the other. Both advocates and opponents of the state's conservation laws readily admit that had the initiative been a referendum on the land use system itself, it surely would have lost. In all likelihood, the passage of Measure 37 was an acknowledgement by Oregonians that the land use system was necessary but flawed. They might not be experts on urban development, land use legalities, or agricultural economics, but as citizens of this state they felt it was necessary to signal the need for reform. Voters weren't motivated by sympathy for developers or large land owners when they cast their ballots in favor of the initiative – it might have been the small farmers unable to build homes on their land who were in their thoughts.

Depending on Measure 37's eventual implementation, the consequences for both the small farmer and the large land developer may play out differently than Oregonians would have anticipated. However, before the citizens are criticized for passing a drastic law, it should be remembered that their voices went largely unheeded after the passage of Measure 7 four years

earlier. After the initiative was struck down as unconstitutional, the government had an opportunity to react to voters' sentiments. House Bill 3089, which would have altered the farm income test to reflect price changes in agricultural commodities, was never enacted. House Bill 2714, which would have allowed LCDC to consider a farm's size and soil class when determining its eligibility for dwelling, passed in the legislature but was vetoed by the Governor. The only major legislation that relaxed the land use system in 2001 was House Bill 3326, which mitigated laws regarding farm dwellings – but only if the land in question was "generally unsuitable for the production of farm crops and livestock or merchantable tree species."

It's impossible to say whether legislation in 2001 could have prevented Measure 37 from getting on the ballot, or from passing with such a large percentage of the vote. But had House Bills 3089 and 2714 passed, the effect on Oregon's land use system would have been minor compared to the uncertainty caused by Measure 37, and by bending to the small farmers, government could have taken a great deal of ammunition out of the hands of the land use system's critics.

As it currently stands, it is impossible to predict the effect Measure 37 will have on Oregon's landscape. Though a large part of current claims were filed by small land owners and are aimed at modest developments, many predict that the largest claims are lurking in the shadows in order to let the legislature clear up many of the initiative's ambiguities – and also to avoid a negative reaction by filing for controversial developments in mid-session. Oregonians may not have seen a contradiction between property rights and preservation, but in practical terms, these two concepts have been clashing for years. "Oregon does have a unique land use program, but the program is characterized less by stability and harmony than by conflict and change," wrote urban and environmental economics specialist Gerrit Knaap in *Planning the Oregon Way*, published over a decade ago. Measure 37, as we can see, fits right in with this tradition of "conflict and change." In a broader sense, this latest battle also reflects a broader trend in Oregon's history; land is at once abundant yet precious, and the laws governing it are both democratic yet dependent on seniority and governmental mandate. Measure 37 should be seen not as a culminating victory or defeat. Rather, it is the latest swing of a pendulum that has managed to elude equilibrium since the first pioneers crossed into the Oregon Territory and filed their own claims over a century ago. **M**

Mateusz Perkowski is a freelance writer in Portland, Oregon.